The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WOLFIRE GAMES, LLC, William Herbert and Daniel Escobar, individually and on behalf of all others similarly situated, Plaintiffs, v. VALVE CORPORATION, Defendant.	Case No. 2:21-cv-00563-JCC
SEAN COLVIN, EVERETT STEPHENS, RYAN LALLY, SUSANN DAVIS, and HOPE MARCHIONDA, individually and on behalf of all others similarly situated, Plaintiffs, v. VALVE CORPORATION, Defendant.	Case No. 2:21-cv-00650-JCC **REPLY IN SUPPORT OF DEFENDANT VALVE CORPORATION'S MOTION TO COMPEL ARBITRATION** **NOTE ON MOTION CALENDAR: September 17, 2021**

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Plaintiffs try to lead the Court down an erroneous path to avoid their agreement to individually arbitrate their claims against Valve—an agreement this Court and the Ninth Circuit recently held was valid and enforceable.

Here, the parties' arbitration agreement delegates questions of validity and arbitrability to the arbitrator. *See G.G. v. Valve Corp.*, 799 F. App'x 557, 558 (9th Cir. Apr. 3, 2020). As such, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) ("*Rent-A-Center*"), defines this Court's task. Under *Rent-A-Center*, when an arbitration agreement includes a delegation clause, all unconscionability challenges to that agreement are delegated to the arbitrator unless the delegation clause itself is challenged as unconscionable. Here, Plaintiffs do not challenge the delegation clause. Their unconscionability challenges are for arbitrators, not this Court.

Nor can Plaintiffs invoke an alleged "poison pill" to avoid their arbitration agreement. Instead of a "poison pill," the parties agreed that any illegal or unenforceable part of their arbitration agreement will be severed and "the rest will remain in effect (with an arbitration award issued before any court proceeding begins)." Steam Subscriber Agreement (Dkt. #36-5) ("SSA") § 11.E. Accordingly, Plaintiffs must pursue their individual claims in arbitration to the extent of the arbitrator's authority. If they win an award and are right that the contractual limitations are illegal or unenforceable because the arbitrator cannot order the "the market-remedying injunctive relief they seek," Opposition to Motion to Compel (Dkt. #51) ("Opp.") at 8, they are then free to seek a market-wide injunction in court "with an arbitration award issued before any court proceeding begins." SSA § 11.E. The Ninth Circuit invited this approach in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), and Valve's arbitration agreement provides it.

Plaintiffs also attempt to rewrite history by arguing Plaintiffs Davis and Marchionda—both of whom the Complaint pleads "purchased PC Desktop Games through the Steam Store"—were actually *not* purchasers, and therefore do not have to honor the arbitration agreement all purchasers agree to. If they were not purchasers of course they have no claims and should not be

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part of this case. And, even if they didn't "push the final button" to execute the transaction, their participation binds them to the arbitration agreement under agency principles.

Finally, Wolfire's arguments against staying its claims until after the arbitrations ignore that all Plaintiffs base all claims on identical allegations, with Plaintiffs asserting they were all harmed by the same alleged conduct, claiming to share identical issues of causation, seeking damages from the same purported overcharge, and seeking the same injunction. Staying Wolfire's claims will allow the arbitrators to determine whether those claims have merit. If the individual Plaintiffs win, they, like Wolfire, may seek "injunctive relief … [to] benefit the public as a whole" in this Court. Consolidated Amended Complaint (Dkt. #34) ("CAC") ¶ 22. It would be far more efficient for the Court to wait for an arbitration award and consider in one proceeding whether the individual Plaintiffs (if they win at arbitration) and Wolfire are entitled to the same injunction benefitting the public as a whole.

A. The Agreement Delegates Plaintiffs' Unconscionability Challenges to the Arbitrator.

Plaintiffs claim their arbitration agreement with Valve is unconscionable because (i) by agreeing not to bring a "private attorney general" or "representative" action they forfeited their right to bring antitrust or CPA claims in arbitration, and (ii) by limiting the arbitrator's injunctive power "to the extent of that party's individual claim," they sacrificed their right to an injunction to "benefit the public as a whole." Opp. at 12–20; CAC ¶ 22. But the parties delegated unconscionability challenges to the arbitrator by incorporating the AAA Consumer and Commercial Arbitration Rules into SSA § 11.C. *See G.G.*, 799 F. App'x at 558. The AAA rules empower the arbitrator to decide "any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Consumer Rule R-14(a); AAA Commercial Rule R-7(a). Plaintiffs' unconscionability challenges go to validity and arbitrability, both delegated to the arbitrators.

This Court could hear Plaintiffs' unconscionability arguments only if they challenged the delegation provision as unconscionable. They do not. In *Rent-A-Center*, the agreement

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delegated to the arbitrator "interpretation, applicability, enforceability or formation of this Agreement" (561 U.S. at 66), which the Supreme Court held was its own separate, severable "agreement to arbitrate threshold issues concerning the arbitration agreement." *Id.* at 68–70. Accordingly, the only question for the Court was whether the delegation clause was valid. *Id.* at 70. If the delegation clause was valid (or unchallenged), all threshold issues—including generally applicable contract defenses like unconscionability—were for the arbitrator. *Id.* at 72.

In virtually identical circumstances, the Ninth Circuit in *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), applied *Rent-A-Center* and held that incorporation of the AAA arbitration rules delegated unconscionability challenges to the arbitrator, explaining:

> We conclude that *Rent-A-Center* controls the present case. Here, three agreements—each nested inside the other—are relevant to our analysis: (1) Brennan's Employment Agreement, (2) the Arbitration Clause (section 16), and (3) the Delegation Provision (i.e., incorporation of the AAA rules which delegates enforceability questions to the arbitrator). The last two are separate agreements to arbitrate different issues. Thus, just like in *Rent-A-Center*, multiple severable arbitration agreements exist. The arbitration clause at issue, as in *Rent-A-Center*, is the Delegation Provision because that is the arbitration agreement Opus Bank seeks to enforce…. [S]ince Brennan failed to "make any arguments specific to the delegation provision," and instead argued "that the [Arbitration Clause] *as a whole* is unconscionable under state law," "we need not consider that claim," because it is for the arbitrator to decide in light of the parties' "clear and unmistakable" delegation of that question, as we held above. Accordingly, the district court did not err in dismissing Brennan's claims in favor of arbitration.

Id. at 1133 (internal citations omitted). Many district courts in the Ninth Circuit agree, as they must. *See, e.g.*, *Ramirez v. Elec. Arts Inc.*, 2021 WL 843184, at *4 (N.D. Cal. Mar. 5, 2021) ("[T]hrough the incorporation of the AAA rules the parties delegated issues regarding the validity of the Arbitration Provision to the arbitrator…. [W]hether the Arbitration Provision is unenforceable because it improperly limits the right to seek public injunctive relief …. is plainly delegated to an arbitrator, rather than this Court, to decide."); *see also Wilson v. Wells Fargo & Co.*, 2021 WL 1853587, at *4 (S.D. Cal. May 10, 2021) (same); *Moffett v. Recording Radio Film*

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Connection, Inc., 2019 WL 6898955, at *7 (C.D. Cal. Oct. 4, 2019) (same, collecting cases).

B. If Plaintiffs' Unconscionability Challenges Succeed, the Arbitrators Will Sever Illegal or Unenforceable Provisions and Enforce the Rest.

If the arbitrators find any part of the parties' arbitration agreement unconscionable, hence illegal or unenforceable, the agreement requires them to enforce the rest and permits Plaintiffs, if they win on the merits, to return to this Court to seek the public injunction they claim they are entitled to. Because the agreement delegates validity and arbitrability to the arbitrators, the Court should not consider this now, but inasmuch as Plaintiffs misstate how the agreement works, Valve explains here how it will respond to those misstatements before the arbitrators.

1. The Alleged "Poison Pill" Is Not a Broad Escape Hatch That Lets Plaintiffs Avoid Their Agreement to Arbitrate Claims and Disputes.

Plaintiffs try to create the misimpression that a "poison pill" defeats the entire arbitration agreement if *any* part of that agreement is found unenforceable. Opp. at 21. That's not what the parties agreed. They agreed that if any part of their arbitration agreement is found to be illegal or unenforceable, that part will be severed, the remainder of the agreement enforced, and any non-arbitrable issues will be resolved in court after arbitrations are complete, stating in SSA § 11.E (emphasis added):

> If any part of Section 11 (Dispute Resolution/Binding Arbitration/Class Action Waiver) is found to be illegal or unenforceable, *the rest will remain in effect* (*with an arbitration award issued before any court proceeding begins*), except that if a finding of partial illegality or unenforceability would allow class, collective, or representative *arbitration*, all of Section 11 will be unenforceable and the claim or dispute will be resolved in court.

Plaintiffs argue that the part of § 11.D authorizing an arbitrator to award relief "only in favor of the individual party seeking relief and only to the extent of that party's individual claim" is unconscionable (and unenforceable) because it rules out "market-remedying injunctive relief" to "benefit the public as a whole." Opp. at 8; CAC ¶ 22. But it permits the arbitrators to award them individual relief, so Plaintiffs can ask the arbitrators for damages and an injunction "removing Valve's anticompetitive provisions" as to them if they prevail. CAC ¶ 22. Further,

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the parties agreed the arbitrator cannot enjoin Valve's treatment of non-parties, § 11.D, and agreed to submit their disputes and claims to arbitration rather than take them to court, § 11.A.

If an arbitrator determines part of the arbitration agreement is unenforceable because, as Plaintiffs contend (but Valve denies), antitrust laws and the CPA confer unwaivable rights to a public injunction to remedy violations of those statutes, SSA § 11.E severs the unenforceable part (no public injunctions) but "the rest will remain in effect (with an arbitration award issued before any court proceeding begins)." This means the parties must first proceed to individual arbitration on the merits. If Plaintiffs win an arbitration award for damages, and perhaps an injunction for themselves, they may then seek injunctive relief to "benefit the public as a whole," CAC ¶ 22, in this Court. Plaintiffs lose no statutory rights or remedies—they simply proceed first in arbitration "with an arbitration award issued before any court proceeding begins." SSA § 11.E.

The *Cottrell* case Plaintiffs cite suggests this approach, noting "AT&T likely could have written an agreement that would sever disputes as to a plaintiff's entitlement to public injunctive relief and reserve those issues for determination by a court." *Cottrell v. AT&T Inc.*, 2020 WL 2747774, at *5, 8 (N.D. Cal. May 27, 2020) (agreement entirely waived public injunctive relief and was unenforceable because "[n]othing in the arbitration agreement suggests that such relief could be awarded by another forum, such as a court"). In contrast, the SSA allows relief "awarded by another forum, such as a court," (*id.*) if necessary after arbitration is finished.

Blair, on which Plaintiffs rely heavily, invited the same approach, but those parties did not take it. Instead, the *Blair* severance clause—a "poison pill"—severed the *entire claim for relief* from arbitration if the agreement's limitations on that claim were held unenforceable. 928 F.3d at 831 (interpreting "claim for relief" to mean "cause of action" in clause stating "[i]f there is a final judicial determination that applicable law precludes enforcement of this Paragraph's limitations as to a particular claim for relief, then that claim (and only that claim) must be severed from the arbitration and may be brought in court"). Accordingly, even though the *Blair*

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arbitration agreement's only unenforceable limitation was its ban on "public injunctive relief," the entire "claim for relief" was severed from arbitration and brought in court. *Id.*

By contrast, the SSA does not declare entire claims or causes of action non-arbitrable if some limitation on them is found unenforceable, but instead severs any unenforceable part and enforces the rest, with non-arbitrable issues to be determined in court after the arbitration is complete. The Ninth Circuit in *Blair* approved of splitting decision-making between an arbitrator and court in this way. *Id.* ("Rent-A-Center contends that the severance clause carves out only the potential public injunctive remedy for these causes of action, requiring the arbitrator to adjudicate liability first…. Parties are welcome to agree to split decisionmaking between a court and an arbitrator in this manner…. But they did not do so here.").

Plaintiffs' "poison pill" argument is also wrong because SSA § 11.E discards arbitration entirely only when "a finding of partial illegality or unenforceability would allow class, collective, or representative arbitration," making it clear arbitrators may not conduct class-wide arbitrations. Plaintiffs argue they fit into this narrow exception because "federal antitrust and Washington state CPA claims are fundamentally representative in nature." Opp. at 21. They do not. Arbitrators may award individual damages and injunctive relief on antitrust and CPA claims, as SSA §§ 11.A, .C, & .D permit. Moreover, courts routinely enforce similar arbitration agreements waiving "representative actions." *See, e.g.*, this Court's and the Ninth Circuit's rulings in *G.G.*; *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) ("*Italian Colors*") (compelling individual arbitration of antitrust claims under arbitration agreement waived the right to sue in a "representative capacity"; agreement text at *In re Am. Express Merchs. Litig.*, 667 F.3d 204, 209 (2d Cir. 2012)); *Harbers v. Eddie Bauer, LLC*, 2019 WL 6130822, at *1, 8–9 (W.D. Wash. Nov. 19, 2019) (compelling arbitration of CPA claim seeking injunctive relief under agreement that waived "class-wide arbitration, private attorney-general action, or any other proceeding where someone acts in a representative capacity"); *Amazon.com, Inc. v. Arobo Trade, Inc.*, 2017 WL 3424976, at *4 (W.D. Wash. Aug. 9, 2017) (confirming arbitration award

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of injunctive relief on CPA claim where agreement provided arbitration "will be conducted only on an individual basis and not in a class, consolidated or representative action").[1]

2. SSA § 11.E Ensures the SSA Is Not Permeated With Unconscionability.

Plaintiffs also argue the parties' arbitration agreement is unenforceable because "[s]ubstantive unconscionability permeates the SSA's arbitration provisions." Opp. at 22. Wrong again. Plaintiffs challenge only two provisions as unconscionable. Both are readily severed if an arbitrator agrees with Plaintiffs' challenges. That *eliminates* any issue of potential unconscionability while preserving the balance of the parties' arbitration agreement, which is exactly how it should work. *See Zuver v. Airtouch Commcn's, Inc*., 153 Wash. 2d 293, 320, 103 P. 3d 753 (2004) ("Courts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties…. Consequently, when parties have agreed to a severability clause in an arbitration agreement, courts often strike the offending unconscionable provisions to preserve the contract's essential term of arbitration."). Nor does *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash. 2d 598, 293 P.3d 1197 (2013), require the entire arbitration agreement be discarded. The *Gandee* court declined to sever unenforceable provisions from an arbitration agreement because it "would require essentially a rewriting of the arbitration agreement." *Id.* at 607. The SSA is nothing like the short arbitration clause in *Gandee*, and § 11.E already explains that if unenforceable provisions are severed, the remainder of the clause is enforced.

All that said, these unconscionability arguments raising validity and arbitrability challenges are for the arbitrators, so the Court should not decide them, and instead await the arbitrators' awards.

C. Plaintiffs' Effective Vindication Argument Fails.

Plaintiffs again misconstrue the SSA to argue it is unenforceable under the effective vindication doctrine because it supposedly eliminates statutory rights. Opp. at 12. Surprisingly,

[1] *See* Exhibit 1 to the Declaration of Raina V. Wagner, *Amazon.com, Inc. v. Arobo Trade, Inc.*, No. C17-0804-JLR (W.D. Wash. May 24, 2017) (Dkt. #2-1 at 9) (arbitration agreement).

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Plaintiffs rely on *Italian Colors*, which compelled individual arbitration of antitrust claims. The agreement the Supreme Court enforced there over an "effective vindication" objection included the *same* "representative" language Plaintiffs claim here is an unenforceable waiver of antitrust and CPA claims. *See In re Am. Express*, 667 F.3d at 209 (reciting clause at issue in *Italian Colors*, which waived "right to participate in a representative capacity" and to arbitrate claims "brought in a purported representative capacity on behalf of the general public"). Moreover, under *Italian Colors*, the question is whether a provision in an arbitration agreement entirely "*forbid[s]* the assertion of certain statutory rights" or "eliminates those parties' right to pursue their statutory remedy." 570 U.S. at 236 (emphasis added). The SSA does not forbid any claims or remedy; it merely determines when and where Plaintiffs may seek a "public injunction."

D. Any Doubts Must Be Resolved in Favor of Arbitration.

Even if compelling arbitration were a close question—and it is not—all doubts are to be resolved in favor of arbitration. The FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). The FAA leaves no room for discretion, *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011), and "courts must 'rigorously enforce' arbitration agreements according to their terms." *Italian Colors*, 570 U.S. at 233 (citation omitted). Accordingly, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *see also Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1022 (9th Cir. 2016); *In re Wyze Data Incident Litig.*, 2020 WL 6202724, at *1 (W.D. Wash. Oct. 22, 2020); *G.G. v. Valve Corp.*, 2017 WL 1210220, at *2, 4 (W.D. Wash. Apr. 3, 2017).

E. Plaintiffs Davis and Marchionda Are Bound by the Arbitration Agreement.

Despite expressly alleging in the Complaint that they purchased games on Steam for their children (CAC ¶¶ 27, 30), Plaintiffs Davis and Marchionda now claim they are not really

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purchasers because they did not click the final checkbox to complete the transaction. Opp. at 24. They cannot have it both ways. Either (1) they bought games on Steam and are subject to the SSA's arbitration agreement, or (2) they did not buy games on Steam and have no standing.

Moreover, even if Davis and Marchionda did not click the final checkbox, they are still bound to arbitrate under agency principles. *See Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) ("General contract and agency principles apply in determining the enforcement of an arbitration agreement by or against nonsignatories."). Under Washington law, an agent may bind a principal to a contract when the agent has actual or apparent authority to act on the principal's behalf. *King v. Riveland*, 125 Wash. 2d 500, 507, 886 P.2d 160 (1994).

Courts bind individuals to terms their agent agreed to when making online purchases with their authorization as is alleged here. *E.g.*, *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 269 (E.D.N.Y. 2019) (holding husband was bound to Amazon's arbitration agreement where his wife gave her friend permission to sign her up for an account and then the husband used his wife's account to make online purchases) (applying Washington law), *aff'd*, 815 F. App'x 612 (2d Cir. 2020); *Chung v. StudentCity.com, Inc.*, 2013 WL 504757, at *4 (D. Mass. Feb. 12, 2013) (holding parents were bound by arbitration agreement to which their daughter agreed when daughter made online payments using their debit cards with permission); *Hofer v. Gap, Inc.*, 516 F. Supp. 2d 161, 174–76 (D. Mass. 2007) (holding plaintiff was bound by liability disclaimer because her friend purchased travel reservations as her agent).

In *Chung*, for example, a minor child used her parents' debit cards with their permission to pay for a tour, each time checking a box agreeing to StudentCity's customer agreement with an arbitration clause. 2013 WL 504757, at *2. The parents were not present at the computer for these transactions, but were nonetheless bound by the arbitration agreement because the minor was acting as their agent. *Id.* at *4; *see also id.* at *3 n.7 ("The question is whether the principal sought the immediate result, not whether the principal ultimately benefits from the proposed transaction. For instance, if a parent tells a child to go buy milk at the store, the child buys milk

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as the parent's agent even if the parent only wants the milk for the child. So too here."). Similarly, Davis and Marchionda authorized their children to purchase games on Steam using their money. Dkt. #52 ¶¶ 5–8; Dkt. #53 ¶¶ 5–8. If the children did so and agreed to the SSA and its arbitration agreement, they were acting as agents for Davis and Marchionda, who are bound.

F. Wolfire's Claims Should Be Stayed Pending Arbitration.

1. Wolfire's Claims Should Be Stayed Because All Claims Are Inseparable.

Wolfire does not dispute that all Plaintiffs claim they were harmed by the same alleged anticompetitive conduct, seek damages for the same claimed overcharge, and seek the same injunction. *See* Dkt. #35 at 13–14. They say:

> Valve's conduct harms *all* direct purchasers in the same essential way, at the same time, and for the same reasons. Moreover, proving that Valve's conduct causes anticompetitive effects necessarily involves an analysis of both game publishers and consumers, because this case involves a two-sided platform. Litigating this case on behalf of just one group of direct purchasers in isolation, as W&L propose, is an ill-conceived litigation strategy that disregards the leading Supreme Court authority….
>
> *Amex* is clear: proving competitive harm by a two-sided platform requires showing overall competitive harm, and accounting for the experiences of purchasers on *both* sides of the platform.

Dkt. #55 at 6 (italics in original, underlining added); *see also id.* at 9 ("If the case is litigated on behalf of all direct purchasers at the same time, as in the Wolfire CAC, there is no risk of double recovery: the Wolfire Plaintiffs will put forward a damages model that calculates total damages on both sides while avoiding duplicative damages or inconsistent theories.").

Good reasons support litigating these intertwined issues first in arbitration: Litigating them in court before the arbitrations conclude would interfere with the arbitrations, defeat the agreed order of proceedings, and contradict the strong federal policy prioritizing arbitration. *See Boeing Co. v. Agric. Ins. Co.*, 2005 WL 2276770, at *5–7 (W.D. Wash. Sept. 29, 2005) (staying non-arbitrated claims; "the Court's primary concern is to avoid proceeding in a way that renders the arbitration between Boeing and Federal 'redundant and meaningless; in effect, thwarting the federal policy in favor of arbitration'") (citation omitted). Wolfire argues that *Boeing* is

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inapplicable because it involved "inherently inseparable claims" (Opp. at 30 n.11), but that is exactly how Plaintiffs described all Plaintiffs' claims in the CAC and briefing cited above.

Wolfire also does not deny it seeks the same public injunction remedy as the individual Plaintiffs. Instead, Wolfire argues the SSA prevents any conflicting orders because it entirely bars individuals from seeking public injunctive relief. (*Id.* at 27–28.) Not true. As shown above, if an arbitrator finds the part of the SSA limiting the individual Plaintiffs' ability to seek public injunctive relief unenforceable, those Plaintiffs will arbitrate the merits and individual remedies and, if they prevail, the Court may consider a public injunction "with an arbitration award issued before any court proceeding begins." SSA § 11.E. A stay is the only way for all parties' requests for public injunctive relief to be decided at the same time, avoiding any conflict.

2. Wolfire's Assertions of "Ongoing Harm" Do Not Defeat a Stay.

Wolfire argues that its claims should not be stayed pending arbitration because it is experiencing "ongoing harm." But Wolfire's alleged damages are economic, so any claimed ongoing harm can be adequately compensated through money damages. Wolfire never argues otherwise. "[A] delay in collecting potential damages is not a particularly severe hardship." *Babare v. Sigue Corp.*, 2020 WL 8617424, at *2 (W.D. Wash. Sept. 30, 2020).

The cases Wolfire cites for its "ongoing harm" argument are readily distinguishable. *See Lockyear v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2005) (arbitration not involved; case involved stay pending resolution of bankruptcy case); *E. W. Bank v. Bingham*, 992 F. Supp. 2d 1130 (W.D. Wash. 2014) (denying stay when non-signatory showed no hardship but stay would prevent plaintiff from identifying fraudulent transfers received by non-signatory); *Simitar Entm't Inc. v. Silva Entm't Inc.*, 44 F. Supp. 2d 986 (D. Minn. 1999) (not discussing ongoing harm; denying stay because arbitrable and non-arbitrable claims were based on different facts and legal theories); *Cargill Ferrous Int'l v. The M/V Anatoli*, 935 F. Supp. 833, 837–38 (E.D. La. 1996) (in quote at Opp. at 26:3–6, discussing FAA *mandatory* stay; not discussing ongoing harm as basis to reject *discretionary* stay of non-arbitrated claims); *Fallon v. Locke, Liddell & Sapp LLP*, 2007

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WL 2904052 (N.D. Cal. Oct. 2, 2007) (denying stay because arbitrable and non-arbitrable claims were based on different facts and legal theories and case had been pending for three years).

3. The Balance of Prejudice Strongly Tips in Favor of a Stay.

Finally, Wolfire argues that its claims should go forward now because they will at some point proceed in court, claiming Valve has shown no prejudice. But even the *East West Bank* case Wolfire cites recognized in denying a stay that "simultaneous prosecution of the … claim in arbitration and here would be a waste of judicial resources, [and] would likely lead to a duplication of effort and risk inconsistent decisions." 992 F. Supp. 2d at 1136. Valve will experience that same prejudice because all of Plaintiffs' claims are intertwined.

These concerns led Judge Burgess to stay litigation by one group of plaintiffs while a second group arbitrated their claims against the same defendant in *Ballard v. Corinthian Colleges, Inc.*, 2006 WL 2380668 (W.D. Wash. Aug. 16, 2006). Unable to distinguish *Ballard*, Wolfire largely ignores it, arguing Judge Burgess did not sufficiently explain his holding. Actually, he did. *Id.* at *2. Wolfire similarly dismisses *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097 (C.D. Cal. 2002), as having too little analysis. Opp. at 29. That is no rebuttal. Wolfire cannot dispute that *Bischoff* (1) stayed non-arbitrable claims brought by one group of plaintiffs against DirecTV while *different* plaintiffs arbitrated other claims against the same defendant, and (2) held the stay was warranted because going forward in two forums at the same time "may lead to inconsistent findings which will hinder the pursuit of judicial efficiency" when there is "similarity of the issues of law and fact" and "the potential for inconsistent findings absent a stay." *Id.* at 1114–15. Valve would be prejudiced for the same reasons, and being forced to engage in massive duplication of work, multiplying costs and creating major business distraction.

G. Conclusion

For the foregoing reasons, and those set forth in Valve's motion, the Court should: (1) compel the individual Plaintiffs to individually arbitrate all of their claims against Valve, and (2) stay Wolfire's claims and all other proceedings, pending completion of all arbitrations.

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DATED this 17th day of September, 2021.

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CERTIFICATE OF SERVICE

I certify that I am a secretary at the law firm of Fox Rothschild LLP in Seattle, Washington. I am a U.S. citizen over the age of eighteen years and not a party to the within cause. On the date shown below, I caused to be served a true and correct copy of the foregoing on counsel of record for all other parties to this action as indicated below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 17th day of September, 2021, in Seattle, Washington.

Courtney R. Brooks

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